United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

496

No. 21,997

ALBERT L. HAWKINS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

WILLIAM W. GREENHALGH

PETER C. JENKINS
424 Fifth Street, N.W.
Washington, D.C.

Attorneys for Appellant
(Appointed by this Court)

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II.

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* This is an original appeal. Rule 17 (c)(2)(iii), GENERAL RULES, supplementing Fed. R. App. P.

CONSTITUTIONAL PROVISIONS

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

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JURISDICTIONAL STATEMENT

On February 9, 1968, in the United States District Court for the District of Columbia, appellant, Albert L. Hawkins, was convicted of robbery and assault with a dangerous weapon. Notice of appeal from the final decision was filed in a timely manner, and on May 8, 1968, this Court granted appellant's petition for leave to prosecute his appeal without prepayment of costs. The jurisdiction of this Court is properly invoked pursuant to the rules of this Court, and 28 U.S. Code § 1291.

STATEMENT OF THE CASE

Procedural Background.

In the early morning hours of October 15, 1967, Richard Bullock, the night clerk at Newman's Tourist Home, 932 French St. N.W., was robbed by three men carrying weapons. The robbery was immediately reported to the police.

Two days later, about 12:30 a.m. on October 17, 1967, the appellant and one Robert Young were arrested in connection with an alleged robbery of Buddie's Tourist Home, also located in the District of Columbia. When arrested, both men were identified by an eye-witness to the hold-up and were then taken to the 13th Precinct of the Metropolitan Police Department for "booking". About 2:40 a.m. that same morning, Richard Bullock was summoned to the police station to see if he could identify either Young or the appellant as the men who had robbed him two days before. Bullock identified the appellant. At the time of this show-up, no attorney was present, and neither Young nor the appellant had been presented to a magistrate on the charge for which they had been arrested.

Later during the day of October 17th, Young and the appellant were presented to Judge Alfred Burka of the D.C. Court of General Sessions and informed of their rights.[1/] On October 30, 1967,

1. Young was released on personal recognizance. He fled the jurisdiction. The appellant was unable to make bond and was remanded to jail.

a preliminary hearing was held and the appellant was bound over for action of the Grand Jury in connection with the robbery of Buddie's Tourist Home.

On November 29, 1967, a duly sworn Grand Jury returned two indictments: One charged the appellant with crimes allegedly committed on October 17, 1967 for which he had been arrested; the other was an original indictment charging appellant with robbery (22 D.C. Code § 2901) and two counts of assault with a dangerous weapon (22 D.C. Code § 502) in connection with the events occurring at Newman Tourist Home on October 15, 1967. Appellant was arraigned on December 15, 1967, and pled not guilty to all counts charged in both indictments.

The government prosecuted the original indictment first. On February 9, 1968, a jury found the appellant guilty of robbery and one count of assault with a dangerous weapon. On April 5, 1968, appellant was sentenced to five to fifteen years on Count One, and three to ten years on Count Two, sentences to run concurrently. Notice of appeal was filed in a timely manner.

Trial.

At trial, the complainant, Richard Bullock, testified that at about 4:45 a.m. on the morning of October 15, 1967, he was robbed and assaulted by three men carrying pistols. (Tr. 5-6) He stated that he and a Rosa Washington were together in the office of the Newman Tourist Home when a man entered with a gun and demanded their

money.[2] (Tr. 5) At this point, without objection from defense counsel, Mr. Bullock made an in-court identification of the appellant. (Tr. 5-6) Then, continuing his testimony, he alleged that this man was joined a few minutes later by another, and that a third man entered about three minutes after that. In all, they stayed close to ten minutes. (Tr. 6,9) Sometime after the three men had gathered in the office, the first man to enter took money belonging to the tourist home from Bullock's pocket. (Tr. 6) At gun point, Bullock was then forced into the brightly lighted hallway adjacent to the office. (Tr. 9) More money was taken from a closet. (Tr. 7) Shortly thereafter, the doorbell sounded as a customer entered the tourist home. The robbers fled. (Tr. 7-8)

Bullock testified that during the hold-up, the first man stood close to him with a gun in his ribs (Tr. 10,17), and had nothing covering his face. (Tr. 10)

A patrol car was first to arrive after the robbery. (Tr. 11,45) Bullock identified his assailants as reported in PD 251:

> Number One: Negro male, twenty to twenty-one years, about six feet tall, heavy built, dark brown skin, had processed hair held in place by a dark gray handerchief, and wearing a gray striped sweater-coat.
>
> Number Two Negro male, twenty-two to twenty-three years, five foot six inches, bare headed, dark skin, wearing a brown sweater.
>
> Number Three: Negro male. No further description.

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2. Although Rosa Washington was present at the scene of the robbery, she was never called to identify the appellant nor to testify at trial.

(Tr. 58) When Officer Jenkins from the robbery squad arrived later, Bullock gave generally the same description of the first man, but added that the man had a mustache and a goatee. (Tr. 46) Bullock claimed he was paying attention to the first man who entered (Tr. 17), thus accounting for the less complete descriptions of the other robbers. (Tr. 17)

The first time anything was mentioned about a previous out-of-court identification of the appellant was on cross-examination of Richard Bullock. (Tr. 20) Counsel for the defense approached the bench and made known his intention to develop the facts surrounding this prior identification. The Court held a hearing out of the presence of the jury at which the following facts were revealed.

Two days after the robbery, at about 2:40 a.m. on October 17, 1967, Bullock was called at home by Officer Jenkins. (Tr. 21,29) Officer Jenkins informed Bullock that the police had just arrested two men for the robbery of another tourist home (Tr. 23), and requested Bullock to come to the police station to see "if one of the fellows there was the one that robbed [him]". (Tr. 24,25,29) When Bullock arrived, no line-up was held (Tr. 26,37); rather, the two men who had been arrested were in a room with about ten other men. (Tr. 23) Bullock testified that he thought six of these men were detectives. (Tr. 23-24) The suspects were in opposite corners of the room (Tr. 24); Bullock looked at the men, and identified the appellant. At

the time, the appellant was wearing a red coat-sweater, no tie, and had nothing on his head. (Tr. 25) The government attorney asked Bullock whether, regardless of the identification made on the 17th of October, the appellant was the same man he had seen on the 15th. Bullock said that he was.[3/] (Tr. 29)

At the close of the hearing, counsel for the defendant stated to the Court that he intended to go into the identification matter before the jury. (Tr. 30) The Court directed counsel:

> I"ll let you examine the witness in the presence of the jury if you want to. You are the attorney and it is up to you to set your strategy, your procedure, or your plan. If you develop this you can't complain later that the Court didn't give you opportunity to keep it out, you understand?

(Tr. 31)

The jury returned, and cross-examination of Bullock continued. In retracing the out-of-court identification, additional facts were revealed. Young and the appellant were the only men in the corners of the room when Bullock entered. (Tr. 34) The appellant was sitting and Young was on the other side of the room standing up. (Tr. 35) The policemen were "standing around talking", four or five had on police uniforms, and some of the others had their jackets off and their holsters showing. (Tr 33,34) During the identification, the appellant was never asked to stand up. (Tr. 35,39,59) Although Bullock claimed to have been close

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3. Bullock also testified at the hearing that he had looked at mug shots Sunday morning after the robbery, but could not identify the appellant. The record does not indicate whether Albert Hawkins' picture was among those reviewed by Bullock. (Tr. 27,28)

to the appellant during the robbery, he admitted not noticing a scar on Hawkin's face. (Tr. 36-37)

Officer Jenkins was then called by the government. He confirmed that he had investigated the crime on October 15th, and was given a description of the robbers by Bullock. (Tr. 45-47) He also testified that he had called Bullock to come to the station two days later to make an identification. Officer Jenkins remembered that of the ten men in the room that morning, nine were Negro. Four officers were in uniform, and the rest had on street clothing. (Tr. 49) All of the men, except the appellant and Young, had on ties. (Tr. 54)

The government rested at the completion of Officer Jenkins' testimony. (Tr. 60) Defense counsel moved for a judgement of acquittal; the Court denied the motion. (Tr. 60-61)

For the defense, both Albert Hawkins and his common-law wife, Barbara Damico, testified that they were home in bed at the time of the alleged Newman Tourist Home robbery, and that neither left their apartment during the night. (Tr. 85-87,103, 113-115) There was some inconsistency in their testimony regarding the whereabouts of their children the evening of October 15th when the appellant and his wife attended a party (Tr. 82-83,102,103,112,113), and also regarding the question of whether or not the appellant ever owned or wore a head scarf. (Tr. 91,92,104,117,118) Except for this inconsistency, Miss Damico's testimony corroborated the appellant's story, and the alibi was not rebutted by the government.

In questioning the appellant concerning his physical description, Albert Hawkins admitted that he wore his hair processed (Tr. 68), and had a moustache and small goatee under his lip. (Tr. 90) However, he testified without contradiction that he was five feet nine inches tall, five feet ten at the most. (Tr.69,91) In contradiction to Bullock's testimony, the appellant claimed that he was asked to stand up and did stand when confronted by Bullock at the police station. (Tr. 68) The appellant said nothing at the time. (Tr. 68)

Again at the close of all the testimony, defense counsel renewed his motion for judgement of acquittal; again it was denied. (Tr. 60-61)

SUMMARY OF ARGUMENT

I.

After the complaining witness had identified the defendant at trial, counsel for the defense elicited testimony concerning a pre-trial confrontation between the witness and the accused. By the close of the government's case-in-chief, it was clear that the confrontation was conducted in violation of the appellant's Sixth Amendment right to counsel in that no attorney had been present at the initial identification, and, also, in violation of his Fifth Amendment right to due process of law for the show-up had been unnecessarily suggestive and conducive to irreparable mistaken identification.

The trial court should have excluded the courtroom identification when the government failed to establish by clear and convincing evidence that the in-court identification was of an independent source and not tainted by the prior confrontation.

II.

The pre-trial confrontation was held during a period of illegal detention. Appellant had been arrested and identified in connection with another robbery. He had not been presented to a magistrate on that charge when the complainant in this case was called to the police station to make an identification.

The exploitation of that illegality directly resulted in

the one piece of evidence which convicted the defendant at trial --- the in-court identification. In light of recent Supreme Court decisions, this Court is respectfully requested to review its holding in Payne v. United States, 111 U.S.App. D.C. 94, 294 F.2d 723, cert. denied, 368 U.S. 883 (1961), and hold that as the product of the illegal detention, the court-room identification should have been excluded.

III.

The only evidence submitted by the government at trial was the complainant's testimony that the defendant was the man who had robbed and assaulted him. In addition to the inherently unreliable nature of such testimony, the identification in this case was, by no uncertain means, "tainted" by what might mildly be termed a suggestive and illegal pre-trial confrontation.

Under these circumstances, without some other evidence which tends to support the identification by the complainant, the guilt of the defendant is not established beyond a reasonable doubt. The motion for judgment of acquittal was improperly denied.

ARGUMENT*

I. THE TRIAL COURT ERRED IN PERMITTING THE COURTROOM IDENTIFICATION OF THE ACCUSED.

The appellant wishes to join in the joint supplemental memorandum offered to this Court by court-appointed counsel in the case of Malcus T. Clemons, now on appeal.[4] It is therein submitted that the trilogy of Supreme Court decisions[5] concerning pretrial eye-witness confrontations seeks to establish the following scheme as to admissibility of courtroom identifications of the accused.

I. The Admissibility of an In-Court Identification by the Witness.

A. Burden of the Defendant. If the defendant wishes to exclude an in-court identification, he must establish that the pre-trial confrontation between the identifying witness and the defendant was tainted by some illegality.

1. If the confrontation took place before June 12, 1967, the date Wade, Gilbert and Stovall were decided, then the taint must be established by showing that the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification..." that the defendant was denied due process of law. Stovall v. Denno, supra at 302.

2. If the confrontation took place after June 12, 1967, then the taint may be established in either of two ways:

(a) showing that no counsel was present at the confrontation to represent the accused, and that

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* All the designated pages are relevant to this argument.

4. Malcus T. Clemons v. United States, No. 19,846; David E. Clark v. United States, No. 21,001; Alvin C. Hines, No. 21, 249, argued en banc August 2, 1968.

5. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

the accused did not intelligently waive his right to counsel at this critical stage,* or
(b) showing that although counsel was present, the confrontation was nevertheless so unnecessarily suggestive and conducive to irreparable mistaken identification that the accused was denied due process of law.

B. Burden of the Government. If the defense succeeds in establishing that the pre-trial confrontation was tainted, the burden shifts to the government to "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the [tainted] lineup identification." United States v. Wade, supra, at 240.**

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* The Supreme Court explicitly stated that this method of establishing taint may be removed in the future by the establishment of "systematic and scientific" identification procedures which eliminate the risks of abuse, unintentional suggestion and impediments to meaningful confrontation at trial. United States v. Wade, supra at 239 n. 30 (1967).

** The test was also stated:
"Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by means sufficiently distinguishable to be purged of the primary taint." United States v. Wade, supra at 241.

At trial, Richard Bullock identified Albert Hawkins as his assailant. On cross-examination, defense counsel sought to discredit this identification by eliciting testimony which would reveal the circumstances surrounding an illegal pre-trial confrontation. By the close of the government's case-in-chief it was clear that no attorney had been present at the initial identification, and that the show-up had been unnecessarily suggestive and conducive to irreparable mistaken identification.

Based on the guide-lines established by Wade, Gilbert and Stovall outlined above, it is the contention of the appellant that the trial court erred in permitting the courtroom identification of the accused to stand.[6]

A. The Pre-trial Confrontation Denied The Defendant His Sixth Amendment Right To Counsel.

1. The confrontation was a "critical" stage of the proceedings.

The Sixth Amendment's guarantee of assistance of counsel attaches to all "critical" stages of criminal proceedings. Wade, supra at 6.[7] Whenever necessary to assure a meaningful defense, the accused has the right to an attorney. Wade, supra at 6.

Recognizing that a pre-trial confrontation compelled by the State between the accused and the victim of a crime to elicit an identification is pecularly riddled with innumerable dangers which might seriously, even crucially, derogate from

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6. The validity of the courtroom identification is an issue properly on appeal. Clearly, questions cannot be presented that have not been determined by the District Court from which the appeal is taken, but this is not the case. Although defense counsel made no direct objection to the courtroom identification, the validity of the identification was undoubtedly challenged. It was, in fact, the only contested issue. Surely the District Court was aware of the Wade decision handed down some seven months before trial. To have admitted the in-court identification without first determining that it was not tainted by a prior illegal confrontation would have been constitutional error. Gilbert, supra at 272.

7. See also, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

a fair trial, the Supreme Court held in Wade that "there can be little doubt that...the post-indictment line-up was a critical stage of the prosecution..." 388 U.S. at 236-37. Thus, absent waiver counsel's presence is a requisite to conduct of a line-up.

Although Wade involved a post-indictment identification made in the absence of counsel already appointed, the same grave potential for prejudice which existed there, was present in this case. Nothing tied the defendant to the Newman Tourist Home robbery, but the police had called Bullock at 2:40 a.m. to make an identification. In the custody of the police, the accused was presented to the witness. All the dangers inherent in eye-witness identifications surrounded this confrontation. The accused's fate hung in the outcome. It was undoubtedly a "critical" stage in the proceeding.

2. No counsel was present.

Bullock testified that of the ten men in the room where the show-up was held, six were detectives, and two were the men he was to identify. (Tr. 23-24) He recalled that the others were uniformed officers. (Tr. 37-38) The fact that no attorney was present was established when Officer Jenkins testified that there were ten men in the room, four detectives, four policemen, and the two suspects.[8/] (Tr. 49)

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8. Apparently both the U.S. Attorney and the Court were aware of the fact that no counsel had been present, and were prepared to exclude testimony as to the prior identification. Gilbert, supra at 273. The Court instructed counsel that the decision to examine Bullock regarding the confrontation was a tactical one for the defense to make, and that if such

3. The presence of an attorney would not have prejudicially delayed the confrontation.

In Wade, no substantial argument was advanced against the required presence of counsel at the line-up. However, concern was expressed that the requirement would forestall prompt identifications. The Court noted that both Wade and Gilbert had counsel already appointed when the line-ups were held, and that no argument was made that notice to counsel would have prejudicially delayed the confrontations. 388 U.S. at 237.

No prejudice would have resulted in obtaining counsel in this case.[9/] The accused was being lawfully held on another charge for which he had been identified previously. There was absolutely no reason to conduct a show-up at 2:40 a.m. for a crime committed two days before.[10/] In violation of the Sixth Amendment, Albert Hawkins was denied his right to counsel.

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testimony were elicited, counsel could not later complain that it should have been excluded. (Tr. 31) Similarly, the U.S. Attorney remarked in response to defense counsel's intention, "As long as counsel is going into it and aware that he is bringing it forward." (Tr. 21)

9. "Substitute" counsel may also have been appropriate. Although the right to counsel usually means the right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the line-up a critical stage for the presence of the suspect's own counsel. Wade, supra at 237 n.27.

10. Compare, Stovall, supra, where there was a chance that the victim might die and the confrontation was imperative; and, Wise v. United States, 127 U.S.App.D.C. 279, 383 F. 2d 206 (1967), involving the identification of a suspect apprehended immediately after the offense.

B. The Pre-trial Confrontation Denied The Defendant Due Process Of Law.

1. The detention for identification was illegal.

Albert Hawkins had been arrested and positively identified in connection with a robbery which occurred in the late evening hours of October 16, 1967. When Richard Bullock was called to the 13th Precinct at 2:40 a.m., October 17th, to identify Hawkins as the man who had robbed him two days before, Hawkins had not been presented to a magistrate. Thus, not only was there no attorney present at the show-up, but, in addition, the identification was made during a period of illegal detention.

In Adams v. United States, __U.S.App.D.C.__, 399 F.2d 574 (1968), this Court made it explicitly clear that an arrest may not be made for one crime, and then the detention continued prior to presentment for investigatory purposes vis-a-vis other crimes.

The lawful basis for arresting and detaining Albert Hawkins rested on probable cause to believe that he had committed the Buddie's Tourist Home robbery. There was no probable cause to detain him under arrest in connection with other crimes, nor to hold him for identification by Richard Bullock.

> To continue [his] custody without presentment for the purposes of trying to connect [him] with other crimes is to hold in custody for investigation only, and that is illegal...

Id. at 577. See also Gatlin v. United States, 117 U.S.App.D.C. 123, 326 F.2d 666 (1963); Payne v. United States, 111 U.S. App.D.C. 94, 294 F.2d 723, cert. denied, 368 U.S. 883 (1961); United States v. Meachum, 197 F.Supp. 803 (1961).

2. The confrontation was unnecessarily suggestive and conducive to irreparable mistaken identification.

[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.[11]/

Stovall, supra at 302.

In United States v. O'Connor, supra n.11, Judge Gasch of the Dictrict Court concluded that a pre-trial confrontation went beyond the limits imposed by Stovall, Wright, and Wise, supra. The complaining witness in the case, Mr. Perper, had

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11. This Court in Wright v. United States, No. 20,153 (D.C. Cir. January 31, 1968), refused to rule on the merits of a due process challenge without amplification of the record. Although it was clear that the suspect was presented to the witness at the police station, that no line-up was held, and that prior to the confrontation the witness noticed a car outside the station which she had earlier identified as being involved in the larceny, the Court remarked:

> We are uninformed as to the characteristics which by Mrs. Vives' observation served to distinguish appellant from other persons. We know relatively little as to the similarities and the differences, respecting appellant and those in the room with him, in age, height, weight, dress and other physical features. We are not clear as to whether the contested identification was made before or after appellant was asked to stand. Nor can we tell whether, all circumstances considered, a line-up was feasible. These are but illustrative of relevant details we cannot fathom from what is before us.

In United States v. O'Connor, 282 F.Supp. 963 (D.C.D.C. 1968), Judge Gasch, relying on Stovall and Wright concluded that the following factors were relevant in evaluating a challenged pre-trial confrontation:

> 1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?

been accosted by a man with a gun in his place of business. Seeing Mr. Perper's dog, the gunman fled. About 4:00 a.m. on the morning of January 21, 1966, some 18 hours after the attempted robbery, Mr. Perper was called to come to Police Headquarters to identify one of two suspects. The suspects had been arrested in a vehicle similar to the one described by an eye-witness

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2. Where did the confrontation take place?
3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?
4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?
5. Were any tangible objects related to the offense placed before the witness that would encourage identification?
6. Was the witness' identification based on only part of the suspect's total personality?
7. Was the identification a product of mutual reinforcementof opinion among witnesses simultaneously viewing defendant?
8. Was the emotional state of the witness such as to preclude objective identification?
9. Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?
10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?

In even greater detail, the joint supplemental memorandum submitted to this Court in Clemons v. United States, supra n. 4 at 6-16, suggests criteria to be applied in determining whether a pre-trial confrontation has denied a defendant due process of law.

No doubt, all of the criteria enunerated are relevant to the determination. However, as a practical matter, no record in any one case will be complete. It is submitted that the record here on appeal contains sufficient testimony concerning the circumstances surrounding the pre-trial confrontation to establish that the manner in which it was conducted amounted to a denial of due process.

to the incident, and counsel stipulated that prior to confrontation Mr. Perper may have been informed of the circumstances surrounding their arrest and linking the suspects to the crime. No line-up was held. The suspects were presented separately to Mr. Perper. No identification was made. 282 F.Supp. at 966.

In holding the procedure to be a denial of due process, the Court found it significant that: (1) the defendant was essentially the only person who could have been identified; (2) the confrontation was held in the police station at a most unusual hour; (3) there was no need for an immediate confrontation; (4) Mr. Perper may well have concluded that he would not have been called at such an hour had not the police been sure of the suspect's guilt; and (5) Mr. Perper may have been aware of the circumstances surrounding the suspects' arrest. Id. at 967.

The confrontation between Richard Bullock and the appellant in this case was far more suggestive and conducive to misidentification. The show-up was held at 2:40 a.m. in the police station. Surely, Bullock could have concluded that the police had the man that robbed him. Why else would they call him at home at that hour?

There was no question whom the police suspected. Young and Hawkins were isolated in opposite corners of the room. Both were dressed in street clothes; neither had on ties. There were other Negroes present, but Bullock knew that these men were either police officers or detectives.

No line-up was held. Without a showing of necessity to con-

duct an immediate confrontation, this, alone, has been argued to be a denial of due process.[12/] No necessity for the confrontation could be shown. Both Young and Hawkins were being held on other charges. The show-up was not conducted to obtain a "prompt identification of a suspect apprehended immediately after the offense." Wise, supra at 209. Nor was there any danger that "the only person in the world who could possibly exonerate" the suspects might not live. Stovall, supra at 302. Detention in order to investigate a crime for which the suspects had not been arrested was, itself, illegal.

Moreover, the identification was hardly based on the suspect's total personality. There was no chance for comparison. Both Officer Jenkins and Bullock recalled that Hawkins was not asked to stand. Nothing was said by the defendant. Throughout the confrontation, Bullock failed to notice the scar on the defendant's face.

In addition to the suggestivity induced by these circumstances, the police told Bullock prior to the identification that the suspects had been arrested for the robbery of another tourist home. Here, too, considering the totality of the circumstances, "[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." Wade, supra at 234.

In violation of the Fifth Amendment, Albert Hawkins was denied due process of law.

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12. Wright v. United States, No. 20,153 (D.C. Cir. January 31, 1968) (dissent by Bazelon, C.J.).

C. The Government Failed To Establish By Clear And Convincing Evidence That The Courtroom Identification Was Of An Independent Source And Not Tainted By The Prior Confrontation.

Defense counsel challenged the validity of the in-court identification. By the close of the government's case, it was clear that no counsel had been present at the prior confrontation, and that the show-up was highly suggestive and conducive to irreparable mistaken identification. There was no explanation for the failure to hold a line-up. The court remarked to counsel, "I am just as much concerned and interested on the question of identification as both of you are" (Tr. 40), but it never specifically ruled whether or not the pre-trial confrontation was tainted by some illegality. Yet the Court must have decided that it was, for it instructed defense counsel that if he chose to cross-examine Bullock in the presence of the jury with regard to the prior confrontation, he would not later be able to claim error in its admission. Had the pre-trial confrontation not been tainted, there would have been no reason to restrict such testimony. Gilbert, supra.

Once it was determined that the pre-trial confrontation was tainted, the burden shifted to the government to "establish by clear and convincing evidence that the in-court identification [was] based upon observations of the suspect other than the [tainted] identification". Wade, supra at 240. Otherwise, the courtroom identification would be excluded.

Since, in the present case, Bullock's identification of the defendant in court was permitted to stand, the Court had to find that the government had met its burden. Appellant challenges the conclusion.

The description of the robbers that Bullock gave to the police was in evidence. He had testified as to his opportunity to observe the intruders, and he claimed, without hesitation, that he recognized the defendant in spite of the earlier confrontation. But the "independent source"[13/] of Bullock's courtroom identification is not established solely by the circumstances surrounding the crime.

The independent source of the identification depends largely on the susceptibility of the witness and on the suggestivity of the confrontation to which he has been subjected. Wade, supra at 241 & n.33. These factors cannot be divorced in determining whether the primary illegal taint has been dissipated, for the more suggestive the illegal confrontation, "the less likely it is to have left the witness independent and open minded". Clemons, supra n.4, Joint Supplemental Memorandum at 17.

Bullock claimed that he was uninfluenced by the pre-trial identification, but "it is a matter of common experience that, once a witness has picked out the accused.., he is not likely to go back on his word later on...." Wade, supra at 229.

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13. Gilbert, supra at 272.

Bullock's "opportunity to observe the offender at the scene of the crime and his demonstration of the reliability of that observation by giving a fairly accurate description of the offender"[14/] are only a guage to the witness' susceptibility to being misled later. Admittedly, he gave a fairly accurate description of Albert Hawkins, but the testimony reveals a limited opportunity to observe the assailants. Bullock was held up at 4:30 in the morning. Some seven minutes elapsed before all three robbers had entered the tourist home. Then, at gun point, he was forced into the brightly lighted hallway adjacent to the office. Within a few moments the doorbell sounded, and the robbers had escaped.

The men were all strangers to Bullock. At first, the descriptions he gave were very general. It was only later that he recalled the mustache and goatee worn by one of the robbers. Understandably, he was excited.

Two days later he was called by the police at 2:40 in the morning to make an identification at the station. They had arrested two men for a tourist home robbery, and Bullock knew this. When he arrived at the station, no line-up was held--Albert Hawkins was presented for identification.

The suggestive illegal show-up primed Richard Bullock. The police felt that the defendant was the robber, and this thought

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14. O'Connor, supra n. 11, 282 F.Supp. at 966.

was communicated to Bullock. United States v. Trinette, 284 F. Supp. 720 (D.C.D.C. 1968). The manner in which the confrontation was conducted could not possibly have left him independent and open minded. Objective, impartial judgement was foreclosed. Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). He identified Hawkins.

D. The Trial Court Should Have Excluded The Courtroom Identification.

The confrontation occurred during an illegal detention. Without an attorney present, the police conducted a show-up under circumstances highly suggestive and conducive to mistaken identification.

It is submitted that under these conditions, the description given by Bullock after the robbery, the opportunity he had to observe his assailants, and his belief that he was not influenced by the earlier confrontation, do not establish by "clear and convincing evidence" the independent source of the courtroom identification. The identification should have been excluded. Trinette, supra.

II. THE COURTROOM IDENTIFICATION WAS THE DIRECT FRUIT OF THE ILLEGAL DETENTION AND SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE.*

There is little question that Wade, Gilbert, and Stovall establish that an in-court identification may result from the exploitation of an illegal pre-trial confrontation. If the

* All the designated pages are relevant to this argument.

identification is a fruit of the primary illegality, it must be excluded. In light of these decisions and this Court's recent holding in Adams v. United States, __U.S.App.D.C.__, 399 F.2d 574 (1968), the appellant submits, in the alternative, that the courtroom identification should have been excluded as the direct product of an illegal detention. The failure to do so was plain error within the meaning of Fed.R.Crim.P. 52(b).

In advancing this argument, appellant respectfully requests this Court to review its decision in Payne v. United States, 111 U.S.App.D.C. 94, 294 F.2d 723, cert. denied, 368 U.S. 883 (1961). Similar to the present case, Payne had been arrested for one crime and, prior to presentment, was identified in a line-up by a victim of an earlier crime whom the police had located and summoned to the station. Holding that the subsequent court-room identification was properly admitted, the Court noted:

> The consequence of accepting appellant's contention in the present situation would be that Warren would be forever precluded from testifying against Payne in court, merely because he had come to police headquarters and had there identified Payne as the robber. Such a result is unthinkable. The suppression of the testimony of complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice.

111 U.S.App.D.C. at 98; 294 F.2d at 727.

Since the Payne decision, this Court has specifically held that detaining a suspect prior to presentment for the purpose of investigating crimes other than that for which he has been

lawfully arrested, is illegal. Adams, supra.[15] The suppression of a courtroom identification obtained by exploitation of this illegality is hardly "unthinkable". It is, in fact, the very means of controlling police conduct and advancing the administration of justice.

In this case, Albert Hawkins was being illegally detained when identified by Bullock. The exploitation of that illegality resulted in the one piece of evidence which convicted the defendant --- the in-court identification. As the product of the illegal detention, that identification should have been excluded. Bynum, supra.

III. THE COURTROOM IDENTIFICATION WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE VERDICT.

In the event this Court finds that the courtroom identification was properly admitted, it is the further contention of the appellant that the identification, standing alone, was

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15. The Court relied on Bynum v. United States, 104 U.S.APP.D.C. 368, 262 F.2d 465 (1959), and excluded testimony as to an illegally obtained identification. Compare, Quarles v. United States, 387 F.2d 551 (4th Cir. 1967), where the Court finds that the detention for identification in connection with the arrest is not an "unnecessary" delay prior to presentment, and United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967), where the defendant was linked with the crime from facts which became known apart from the illegal identification.

insufficient evidence to sustain the verdict.[16] The motion for judgment of acquittal was improperly denied.

The only evidence submitted by the government at trial was Bullock's testimony that Albert Hawkins was the man who robbed and assaulted him. No fingerprints taken from the tourist home office or the hallway closet were submitted in evidence. Neither the gun used by the robber, nor the clothes worn by him were introduced at trial. Rosa Washington, the only other eye-witness to the crime, was never called to testify. In short, nothing, other than Bullock's identification in any way linked the defendant to the crime.

Wade, Gilbert, and Stovall illustrate the Supreme Court's concern in even admitting such testimony into evidence. "The identification of strangers is proverbially untrustworthy."[17] If admitted at all, it should be received with the utmost caution.

But it is not the inherently unreliable nature of such testimony which bears against the dependability of the identifi-

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16. 28 U.S. Code § 2106, authorizes an appellate court, when it is "just under the circumstances," to "revers[e] for insufficiency of the evidence to sustain the verdict..." Bryan v. United States, 338 U.S. 552,555 [and] cases there collected. Franklin v. United States, 117 U.S.App.D.C. 331,335,330 F.2d 205,209 (1963). In addition, "It is established that [this Court] has authority to prescribe for this jurisdiction rules relating to proof in criminal cases", and that "there is ample precedent for a ruling by this Court that in certain cases the uncorroborated testimony of one witness will not support a conviction." Kelly v. United States, 90 U.S.App.D.C. 125, 127 & n.2, 194 F.2d 150, 152-153 & n.2 (1952).

17. Wade, supra at 228, citing Mr. Justice Frankfurter in the Case of Sacco and Vanzetti 30 (1927).

cation in this case. Rather, it is the fact that the identification was, by no uncertain means, "tainted" by what might mildly be termed a suggestive and illegal pre-trial confrontation.

In urging the court to find that under these circumstances the identification was insufficient evidence to sustain the verdict, the Court is not being asked to apply any rigid quantitative or qualitative evidentiary requirements. Rather, it is submitted that something else be required -- something which in some way, though insufficient in itself to permit the inference of guilt, would tend to support the identification.[18]

Where the only evidence submitted is the uncorroborated identification of the victim, and where the reliability of that identification is further challenged in light of a suggestive pre-trial confrontation conducive to mis-identification, guilt of the defendant is not established beyond a reasonable doubt. The inescapable doubts are reasonable. The jury should not be permitted to speculate the guilt of the accused.

The motion for judgment of acquittal was improperly denied.

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18. For example, in Stovall, supra, the police had found keys and a shirt at the scene of the crime which led them to the defendant.

CONCLUSION

Appellant prays that this Court reverse his conviction and remand with instructions to enter a judgment of acquittal, or, in the alternative, to reverse and remand for a new trial.

Respectfully submitted,

Peter C. Jenkins

PETER C. JENKINS

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief has been personally served at the Office of the United States Attorney, United States District Courthouse, Washington, D.C., this thirteenth day of November, 1968.

Peter C. Jenkins

PETER C. JENKINS

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,997

ALBERT L. HAWKINS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
SCOTT P. SCHOENFELD,
JOHN G. GILL, JR.,
Assistant United States Attorneys.

Cr. No. 1497-67

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TABLE OF CASES

OTHER REFERENCES

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

1. Whether the identification procedure employed by the Government can be asserted as error for the first time on appeal where

   a. no objection was registered as to the complaining witness' in-court identification,
   b. after a hearing out of the presence of the jury defense counsel expressly rejected the court's offer to suppress pre-trial identification, and
   c. the pre-trial identification was thoroughly aired before the jury by defense counsel as a matter of tactical choice?

2. Whether appellant's *Mallory*- identification issue may be injected for the first time on appeal? If it may, whether such argument is meritorious where

   a. the record shows no unnecessary delay in presentment,
   b. there was additional probable cause to arrest appellant for the crime he committed two nights previous, and
   c. in any event, the trial judge found the in-court identification of appellant to be of independent origin?

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* This case was not previously before this Court under the same or a similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,997

ALBERT L. HAWKINS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed November 29, 1967 appellant was charged with robbery and two counts of assault with a dangerous weapon arising out of an incident at the Newman Tourist Home in the early morning hours of October 15, 1967. Tried by a jury before the Honorable John J. Sirica from February 6-9, 1968, appellant was found guilty of robbery and one count of assault with a dangerous weapon, and received concurrent sentences of 5 to 15 and 3 to 10 years respectively. Appellant was found not guilty on the remaining assault count. This appeal followed.

The Government's case in chief consisted mainly of the testimony of Richard Bullock, the night clerk at the Newman Tourist Home, 932 French Street, N.W., Washington, D.C. At approximately 4:45 a.m. while in the tourist home office in the company of another employee, Rose Washington, Bullock was approached by a man, whom he positively identified as appellant (Tr. 6). Weilding a pistol this man demanded money and was shortly thereafter joined by a second and then a third robber. All three carried guns. Meanwhile appellant put his hand in Bullock's pocket and removed about $30.00 belonging to the tourist home. Appellant then demanded the keys to a closet shoving Bullock and the girl and poking the pistol deep into Bullock's side. The clerk opened the closet and surrendered a roll of money amounting to from $80.00 to $85.00. Whereupon the doorbell sounded and the three felons fled, pushing past an arriving customer. (Tr. 3-10.)

Mr. Bullock further testified that the robbery lasted "a good ten minutes" under bright lighting conditions and that he was thoroughly able to observe the defendant who remained at his side throughout (Tr. 9-10). The police arrived within 15 minutes and after giving a hasty description to a uniformed officer, Bullock minutes later described the first robber to Detective Jenkins as "a heavy set fellow, about 5′ 11″ dark brown skin, had a [hair] process, goat-tee and mustache", wearing a gray coat-sweater (Tr. 10-11).

During cross examination of this witness defense counsel asked a question regarding pre-trial identification (Tr. 20). Before the witness could answer the prosecutor requested a bench conference. At the bench defense counsel among other things said the following:

> MR. WILLIAMS: Your Honor, at this time I plan to go into mode of identification. I realize the prior rules from the Court of Appeals concerning this type thing but we consider it very beneficial to our defense * * *. I realize the significance of the area I am going into, but I realize it is more beneficial to go into it for the defense side. (Tr. 20-21.)

Thereupon the judge suggested a hearing out of the presence of the jury. When the jury retired, the following took place. Mr. Bullock stated that he had absolutely no doubt that appellant was the right man (Tr. 22). Thereafter he testified that on October 17, 1967, he had been asked to come to the 13th Precinct (Tr. 25). Detective Jenkins told him that two men were arrested in connection with a holdup at Buddy's Tourist and he wanted to see if they were the same men who had robbed the Newman Tourist Home two nights before. Bullock was brought into a room containing 11 people and asked if he knew anyone. Nine of the 11 men in the room were Negro (Tr. 50) and Bullock apparently knew or learned later that some of the men were police officers. Appellant was sitting in one corner of the room, and a man named Young was in another corner. Bullock first looked at Young and could not identify him. Then he identified Hawkins as his assailant. (Tr. 23-25.)

Further questioning brought out the facts that appellant had no tie, was wearing a red coat-sweater and remained seated during the identification. Also this was the only occasion on which Bullock viewed appellant other than during the crime and at trial, and this witness had never been told that the police had the man who robbed him; in addition, the witness had not picked out a picture of appellant from more than 100 shown him on the night of the robbery. (Tr. 24-28.)

After this witness reiterated the independent origin of his identification (Tr. 29), defense counsel stated (Tr. 30):

> MR. WILLIAMS: Your Honor, I am going to have to go into this in front of the jury and also the mug shot area. . . .

Then at Tr. 31 the Court said:

> * * * If you develop this you can't complain later that the Court didn't give you opportunity to keep it out, you understand?
>
> MR. WILLIAMS: Yes sir.

Thereupon the jury was recalled and with the benefit of his *voir dire* examination defense counsel again cross-examined Mr. Bullock in greater detail as to his pre-trial identification.

The Government also called Detective Ronald P. Jenkins, who stated that on the morning of October 15, 1967 he arrived at the Newman Tourist Home at 4:56 a.m., and was given the above-noted description of the robber by Mr. Bullock (Tr. 45-66.) It appears that prior to Detective Jenkins' arrival a uniformed officer interviewed this victim and in haste had obtained a short description of the robbers which neglected to mention either mustache or goatee (Tr. 46-47, 53, 57). Both counsel elicited details concerning the pre-trial identification from Detective Jenkins (Tr. 47-51 and Tr. 54, 58-59.)

Appellant presented an alibi defense consisting of his own testimony and that of his wife. Appellant stated that during the afternoon and early morning of October 14, 1967 he and a friend, William Young, had been in Baltimore visiting Young's grandmother (Tr. 65-66.) Upon returning to Washington, D.C. around 10 or 10:30, appellant accompanied by his wife and a friend, Clarence Watts, went to a birthday party given by a man named Dum-Dum at a project in Southeast, Washington (address unknown). (Tr. 66, 75.) Appellant testified that he and his wife left the party between 1:00 and 2:00 a.m., were driven home by Mr. Watts, and went to bed for the remainder of the night. (Tr. 66-67, 75.)

Appellant's wife generally corroborated this story except for stating that her two children remained in her apartment and not in another apartment as appellant had testified (Tr. 80-82, 103). Further contradiction appeared when she said that appellant never wore a scarf around his hair when he slept (Tr. 104). (Compare Tr. 92.)

SUMMARY OF ARGUMENT

I.

As a matter of trial strategy defense counsel waived any right appellant may have had to the suppression of

identification testimony. Having rejected the court's offer to suppress pre-trial identification testimony and having aired it before the jury in an attempt to support his alibi defense, appellant cannot prevail on a totally inconsistent *Wade* theory raised for the first time on appeal.

In this connection appellant's charge that there was no support for the trial judge's finding of independent source of the complaining witness' in-court identification is contrary to the record.

II.

Appellant's *Mallory* argument suffers from many deficiencies. It too was not raised below and the record fails to show lack of presentment let alone unnecessary delay. In any event, at the moment of pre-trial identification there was probable cause to arrest appellant for the robbery two nights before; thus *Adams* v. *United States* is distinguishable. Furthermore a *Mallory* violation identification would not benefit appellant, since the trial judge found the in-court identification to be of independent origin.

ARGUMENT

I. Appellant's conviction does not warrant reversal on the basis of pre-trial identification.

(Tr. 9-11, 17, 20-32)

A. *Defense counsel as a matter of tactics expressly waived any and all objections to pre-trial identification procedure.*[1]

Appellant's frontal assault on his conviction via *United States* v. *Wade*, 388 U.S. 218 (1967) essentially ignores

[1] The main issue in this case is analogous to the issues raised in the Government's petition for rehearing in *(David) Proctor* v. *United States*, No. 21,569. Rehearing is sought from this Court's opinion of October 10, 1968, holding that statements made in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) are not admissible for impeachment purposes, and remanding for a *Stovall* hearing despite defense counsel's failure to raise objection during a post-*Wade* trial. We thus refer the court to that petition for rehearing, particularly Point II of the argument therein.

the tactical defense presented by his experienced trial attorney. His premise (Br. 21) that "[d]efense counsel challenged the validity of the in-court identification" is a gross understatement. After learning the details of the police station identification on *voir dire* (Tr. 21-30), defense counsel chose not to object or seek to suppress any identification testimony; rather, he embraced the pre-trial identification (Tr. 30-31) eliciting details from Mr. Bullock, Detective Jenkins and his client in the presence of the jury. He saw in the defective identification procedure, not prejudice but opportunity. It proved to the jury that appellant was arrested two nights after the offense.[2] Thus this strategem dove-tailed with and corroborated appellant's alibi defense. At the same time defense counsel sought to use "the vagaries" attendant such an identification (see *Wade, supra*, 388 U.S. at 228.) as a vehicles with which to cast doubt in the juror's minds.

Appellee's role in this Court is not to defend the course taken by this experienced criminal practitioner below,[3] rather it is merely to show (1) that for tactical reasons counsel may waive constitutional defenses and (2) that in circumstances of such express waiver appellate consideration should be precluded.

Appellee is aware that many different considerations face an appellate court when an appeal from a conviction is brought by different counsel on a theory totally different from that utilized at trial.[4] However, the Supreme Court has recently held that it would not consider a *clear*

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[2] The fact that this arrest took place as a result of an almost identical *modus operandi* seven blocks away from the Newman Tourist Home was suppressed (Tr. 31-32).

[3] Appellant has a different appointed counsel on appeal. We deem it relevant to point out that his trial counsel, John C. Williams, is an experienced practitioner, having served as appointed counsel in numerous criminal matters.

[4] See generally 1 *John Marshall Journal of Practice and Procedure* 93 "Waiver of Constitutional Rights by Counsel in a Criminal Proceeding". Also see *Johnson* v. *Zerbst*, 304 U.S. 458, 464-5 (1938).

violation of a defendant's constitutional right until a state court has settled the issue as to whether such right had been waived in the course of trial strategy. *Henry* v. *Mississippi*, 379 U.S. 443, 446, 450-451 (1965). In so ruling, where a Fourth Amendment violation had been found by the Mississippi Supreme Court, the court clearly implied that any showing that failure to object to the admission of illegally seized evidence resulted from trial strategy would preclude appellate or *habeas corpus* consideration (379 U.S. at 451, n. 7).

Although the case involved Federal-State considerations, the result in *Henry* was nothing more than the implementation of a most basic tenet of criminal law. E.g., see *Johnson* v. *United States*, 318 U.S. 189 (1942) where at page 201 the Supreme Court plainly stated this rule in a Fifth Amendment privilege against self-incrimination situation:

> Any other course would not comport with the standards for the administration of criminal justice. We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However, unwise the first course may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. * * *

The above quoted language became succinctly apposite to the facts at hand when, in the face of the trial judge's offer to suppress testimony, defense counsel expressly waived all objection to pre-trial identification (Tr. 31).

The record below gives no indication that appellant was in any way dissatisfied with his lawyer's tactics at trial. Thus no exceptional circumstance exists to invalidate this

waiver as in *Brookhardt* v. *Janis*, 384 U.S. 1 (1966).[5] Rather, counsel made the tactical *Wade*-situation election expressly anticipated by this Court in *Clemmons* v. *United States*, No. 19,846 (*en banc*) (December 6, 1968) (at slip op. 9):

> If the judge regards only the in-court identification as admissible, in the trial to the jury thereafter, the defense may, as a matter of trial tactics, decide to bring out the pre-trial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification.

This express recognition in *Clemmons* that *Wade* rights can be waived via tactical election obviates the need for citations to the effect that almost every constitutionally protected right has been deemed waiveable. Indeed this element of experienced tactical choice in the course of a criminal trial is a very essence of the Sixth Amendment right to counsel. Compare *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932) quoted and approved in *Gideon* v. *Wainright*, 372 U.S. 335, 345 (1963).

Having failed to make any objection or motion to suppress the in-court identification and having expressly turned down the judge's offer to suppress pre-trial identification appellant is foreclosed from attacking his conviction on these grounds in this Court. Cf. *Schmerber* v. *California*, 384 U.S. 757, 765-766, n.9 (1966); *Adams et al.* v. *United States*, —— U.S. App. D.C. ——, 399 F.2d 574, 575, n.1 (1968); *Patton* v. *United States*, D.C. Cir. No. 21,161 (October 29, 1968) (slip op. 4, n.3). *Siskowski* v. *United States*, 81 U.S. App. D.C. 247, 279, 158 F.2d 177, 182 (1946), *cert. denied*, 330 U.S. 822 (1947).

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[5] In *Brookhardt* the defendant insisted on his desire to plead not guilty while his lawyer filed what amounted to a *nollo contendere* plea. That situation or whether to waive the right to counsel or jury trial can be easily comprehended by a defendant. The intricacies of the *Wade-Stovall* doctrines, which seem to cause division even among Courts of Appeal (e.g., see *Clemmons* v. *United States*, No. 19,846 (December 6, 1968)), would appear to present a matter that must be left exclusively to the expertise of a lawyer.

B. *The record shows that both the trial judge and defense counsel were properly convinced of the independent origin of Mr. Bullock's in-court identification.*

Appellant concedes (Br. 22) that the trial court necessarily found Mr. Bullock's testimony to stem from an independent source when it applied the *Gilbert*[6] *per se* exclusionary rule to the pre-trial identification.[7] But he attacks that ruling has having no clear and convincing evidentiary foundation (Br. 22-24). As the noted sequence of events indicates, it was the appellant's lack of concern with this issue below that brings an incomplete record to this Court. Had there been objection or request for specific finding, the reasons for the court's action would be fully stated and reviewable. Having induced this situation appellant should be precluded from attacking the finding on appeal. *Cf. Dennis* v. *United States*, 341 U.S. 494,

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[6] *Gilbert* v. *California*, 388 U.S. 263 (1967).

[7] Despite this concession appellee recognizes that the transcript of the proceedings below does not contain an express finding of independent origin and that independent origin is required under *Wade* to permit the in-court identification elicited by the Government. Appellee submits, however, that the lack of express finding is fully explained by the sequence of events below.

First, no objection to any identification testimony or request for findings was made at trial despite the fact that it took place almost seven months after the well-publicized Supreme Court identification decisions (June 12, 1967). Instead defense counsel indicated he knew the circumstances of the pre-trial identification and initially sought to air them before the jury (Tr. 20). It was only at the judge's suggestion that a *voir dire* hearing took place (Tr. 21) and then, when counsel knew the circumstances to which the complaining witness would testify, he noted his impatience to broach the subject before the jury *even prior the judge's sua sponte offer to suppress the pre-trial identification* (Tr. 30).

This would seem enough to cause any judge to end his concern with the identification question, however, in rejecting the Court's offer to suppress counsel raised the collateral matter of the Buddy's Tourist Home robbery (Tr. 31), for which appellant had been arrested. This called for a ruling on a new matter and directed the judge's attention away from the *Wade-Stovall* authorities which clearly, at that point, seemed of no significance to the defense.

500 n.2 (1951); *United States* v. *Indiviglio*, 352 F.2d 276 (2nd Cir. 1965) *cert. denied*, 383 U.S. 907 (1966).

In any event there appears to be more than sufficient evidence to support the trial court's finding even under the high "clear and convincing" standard of *Wade*. Prior to the hearing out of the presence of the jury Bullock related his excellent opportunity to observe the No. 1 robber for 10 minutes in well lighted tourist home (Tr. 9-10, 17) and had noted the detailed description he had given the police minutes after the crime (Tr. 11).[8] Then, the questions at the *voir dire* hearing were largely directed to the origin of Bullock's memory. Bullock had no doubt he was identifying the right man (Tr. 22). When defense counsel had inquired to his satisfaction, the court took it upon itself to question along the specific guidelines set out in *Wade* (Tr. 26-28).[9] Then in response to questioning by the prosecutor Mr. Bullock reaffirmed his identification disregarding anything that occurred on October 17th (Tr. 29).[10] In sum, there is ample support for this finding in an area which has been recognized as within the special competence of trial judges. *Clemons* v. *United States*, *supra* (December 6, 1968) (slip op. pp. 15, 17, 18, 26).[11]

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[8] But for the ommission of a scar and a weight variance this description matched the defendant as to height, complexion, hair process, mustache and goat-tee. A consistant prior description, such as this, was dubbed an important factor in assessing independent source by the *Wade* Court. (288 U.S. at 241). See also the reliable indicators of guilt relied upon by the Supreme Court in *Simmons* v. *United States*, 390 U.S. 377 (1968) at 385.

[9] Beside questioning the witness with regard to his prior description (see note 8 supra), the Court also asked whether he had seen the defendant between the night of the crime and the identification and whether he had been shown a picture of the defendant by the police. (See *Wade*, *supra* 388 U.S. at 241).

[10] While such positiveness about independent base is to be weighed warily, it is a relevant factor which can properly be assessed by experienced trial judges. *Clemons* v. *United States*, *supra* (slip op. 18).

[11] There being sufficient evidence to support a clear and convincing finding of independent origin there certainly was enough identification evidence to bring the case to the jury. Appellant's

II. Appellant's *Mallory* argument, which should not be considered for the first time on appeal, lacks both factual and legal foundation.

(Tr. 29, 31, 47-48)

There is a wealth of authority to the effect that objections to evidence on *Mallory*[12] grounds should be raised at trial. *Leigh* v. *United States*, 117 U.S. App. D.C. 315, 329 F.2d 883 (1964). (Concurring opinion of Wright, J.). *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243, 245 (1962); (*George*) *Williams* v. *United States*, 113 U.S. App. D.C. 7, 9, 303 F.2d 772, 774, *cert. denied*, 369 U.S. 875 (1962). *Blackshear* v. *United States*, 102 U.S. Ap. D.C. 289, 252 F.2d 853 (1958). See *Lawson* v. *United States*, 101 U.S. App. D.C. 332, 248 F.2d 654 (1957). Until the filing of appellant's brief in this Court *Mallory* was never mentioned in the proceedings against him. Accordingly this argument need not be considered. (*Lindburgh*) *Williams* v. *United States*, 113 U.S. App. D.C. 399, 308 F.2d 652 (1962).

Nevertheless appellant has neither the requisite facts nor precedent with which to seek reversal via *Mallory*. First the record contains no showing that appellant had not been presented in accordance with Rule 5(a), Fed. R. Crim. P. prior to being viewed by Bullock. Appellant blandly assumes this crucial fact and propels this assumption into unnecessary delay, again with no record foundation. The only suggestion that presentment had not occurred is contained in the facts that the viewing took place so close to the time of arrest[13] and that there is a

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third argument fails to comprehend that *Wade* is not a condemnation of eyewitness identification but rather a safeguard to insure its reliability. Assurance of reliability is derived either from the presence of counsel or a finding of independent origin at trial.

[12] *Mallory* v. *United States*, 354 U.S. 449 (1957).

[13] The record is silent as to the precise time appellant was arrested. We do know that it occurred after midnight, some time in the early hours of October 17, 1968. (See Tr. 29, also Hawkin's motion to dismiss indictment, July 3, 1968 in Cr. No. 1496-67, which has been made part of the record in this case.) Bullock viewed appellant at 2:40 a.m. on the 17th. (Tr. 29.)

high likelihood that no magistrate would be readily available at 2 a.m. in the morning. From this record which infers at best only a two hour delay [14] and in no sense can be termed unnecessary in the early morning hours, we respectfully submit a violation of Rule 5(a) has not been shown.

Secondly, in any event, appellant's reliance on *Adams* v. *United States*, —— U.S. App. D.C. ——, 399 F.2d 574 (1968) is particularly misplaced. The clear implication of *Adams* was that, if there were additional probable cause to arrest or hold the defendants for crimes other than the one for which they were initially apprehended, identification as to those crimes would not be suppressed. Slip op. 6 reads:

> There was no probable cause to detain them under arrest for other matters. * * *, its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention.

Here, when Detective Jenkins observed that appellant fit the detailed description given him of the Newman-October 15th robber (Tr. 47-48) and connected with the facts that both robberies occurred at tourist homes some seven blocks apart with identical *modus operandi*, there was ample probable cause to arrest (or re-arrest) appellant for the October 15th robbery. Thus *Adams* provides no cause for reversal.

However, *arguendo* assuming some *Mallory* violation, the in-Court identification, the only one elicited by the Government, should not be suppressed. This Circuit's recent decision in (*Robert Earl*) *Williams* v. *United States*, No. 21,270 (December 20, 1968) is explicit in applying the "no taint" or "independent origin" test to the *Mallory*-violation-identification situation when the Government

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[14] As it applies to the District of Columbia Rule 5(a) appears to permit questioning for a period not to exceed three hours immediately following arrest. Sections 301(a) and (b) of P.L. 90-226, 90th Cong. 1st Sess., 81 Stat. 735-36 (1967); and see Section 3501(c) P.L. 90-351, 90th Cong., 2d Sess., 82 Stat. 210 (1968) (6 hours).

only presents testimony as to in-Court identification. This being the same standard applied in violations of *Wade* and *Gilbert* (*(Robert Earl) Williams, supra,* slip op. 9-10), no suppression is required here since, as appellant, concedes (Br. 22), the district judge made an independent source finding. As stressed previously the judge was willing to keep out all testimony as to the out of Court identification (Tr. 31).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
SCOTT R. SCHOENFELD,
JOHN G. GILL, JR.,
Assistant United States Attorneys.

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